

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1766

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1766

BETTY MARKOWITZ, WALTER MARKOWITZ, and CHARLES
MARKOWITZ, on behalf of themselves and their
sister, ESTELLE POSNER,

Plaintiffs-Appellants,

-against-

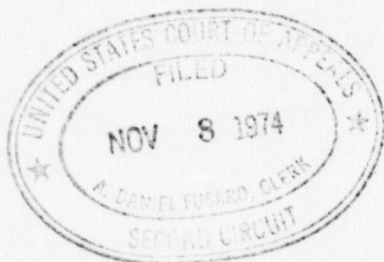
ABE LAVINE, individually and as Commissioner
of the New York State Department of Social
Services,

Defendant-Appellee.

JOINT APPENDIX SUPPLEMENT CONTAINING
CORRECTED FAIR HEARING TRANSCRIPT

JONATHAN A. WEISS
Attorney for Appellants
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BURTON HERMAN
Attorney for Appellee
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2 World Trade Center
New York, New York 10047



PAGINATION AS IN ORIGINAL COPY

CORRECTED TRANSCRIPT

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

-----x
In the Matter of the Appeal of :

ESTELLE PCSNER :

From a Determination by the New York :
City Department of Social Services :
to Medical Assistance. :

-----x
November 1, 1973.
2:00 P.M.

World Trade Center
No. 2 Building
New York, New York 10007

B E F O R E:

MICHAEL CIMORELLI, ESQ.,

Hearing Officer.

Reported by:
Marie Hickey.

CARROTHERS REPORTING SERVICE

128 BROADWAY
NEW YORK, N. Y. 10038

227-2848-9

A P P E A R A N C E S:

FOR THE APPELLANT:

Mrs. Estelle Posner Appellant (not present)

Mr. Jonathan A. Weiss, Esq.
2095 Broadway
New York, New York 10023

Mr. Robert Caldwell Observer
Masonic Home
Utica, New York

Mrs. Betty Markwoitz Mother of Appellant

Mr. Walter Markwoitz Brother of Appellant

Mr. Charles Markwoitz Brother of Appellant

FOR THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES:

Mr. Saul Statmin Fair Hearing
Representative

oOo

HEARING OFFICER: On the record.

This Fair Hearing was requested by Mrs. Estelle Posner. Mrs. Posner is not present here today. The request for a Fair Hearing was made by calendar, and, Charles Markwoitz, on behalf of Mrs. Posner.

Am I correct on that, Mr. Weiss?

MR. WEISS: Yes.

HEARING OFFICER: The Appeal is from a determination by the Onelida County of Social Services, and the New York City Department of

1
2 Social Services, and there is no one present
3 from the Oneida County of Social Services;
4 there has been a summary which has been
5 submitted, at a previous time by that Agency.

6 The issue relates to the denial by both
7 Agencies, of an application for Medical
8 Assistance authorization, on behalf of Mrs.
9 Estelle Posner.

10 Am I correct on that, Mr. Weiss?

11 MR. WEISS: I believe so. Though I never
12 received that summary ^{at} ~~of~~ ^{or now.} the previous Hearing. [^]

13 HEARING OFFICER: I have not checked my
14 record correctly. I understand there has been
15 a summary submitted.

16 MR. WEISS: Not to my knowledge.

17 HEARING OFFICER: The Hearing will be
18 conducted in the following manner: Each side
19 will present its case through the testimony of
20 witnesses and through the introduction of
21 documents.

22 Each side will have an opportunity to
23 question the witnesses for the other side.

24 Upon completion of the Hearing, the record
25 will be sent to Albany, where the Commissioner

1
2 of the State Department of Social Services will
3 render his decision.

4 My name is Michael Cimarelli, and I have
5 been designated by the Commissioner of the New
6 York State Department of Social Services to
7 conduct this Hearing.

8 Before we proceed into the taking of
9 evidence, as such, as to the eligibility of the
10 Appellant, or the determination of the Agency,
11 involved, I would like to go into several issues
12 which to me, relate to this problem: one, I
13 understand that Mrs Posner is presently at a
14 home in Utica New York; that she was placed
15 there by her husband.

16 Am I correct, Mr. Weiss?

17 MR. WEISS: I believe so.

18 HEARING OFFICER: Mr. Posner is not present.
19 I understand from a copy of a letter which I
20 have in my file, which is signed by, Maxwell
21 Posner, that he is objecting to this Hearing,
22 and he states in his closing paragraph, "I have
23 never asked for or do I wish to receive Medicare
24 for Mrs. Posner. I challenge the authority to
25 apply for Medicare for my wife, or having a

1
2 Fair Hearing on my behalf."

3 Have you seen this statement, Mr. Weiss?

4 MR. WEISS: I have not seen a copy of that.
5 You said that is a copy rather an original, ~~so~~
6 I object to that ~~being~~ ^{not} used. It is im-
7 properly here, I was given it and there is no
8 relevancy, and in addition ^{to} ~~being~~ ^{it} being incorrect.
9

10 HEARING OFFICER: I believe it is relevant
11 if a man is objecting to a Hearing. He is
12 legally responsible.

13 MR. WEISS: It is irrelevant so far as
14 it is a law who may ~~appear~~ ^{appear} or not ~~appear~~ ^{appear}. It is
15 quite clear under Section 366 that, Mrs. Posner,
16 is eligible. It is quite clear under Section
17 350 of the Department regulations that a
18 representative may apply, ~~that is or by repre-~~
19 ~~sentative expressly as expressed in writing.~~

20 The authorization form and application
21 show what he says is irrelevant.

22 HEARING OFFICER: Well, there is a Department
23 regulation 353.4 which deals with rights to a
24 Fair Hearing, and I will read part of it
25 the following persons shall be entitled to a
Fair Hearing. Applicants for or recipients of

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2 Aid to Dependent Children, Aid to the Aged,
3 Blind or Disabled, Medical Assistance for needy
4 persons on Home Relief, or Veteran's Assistance
5 on the following grounds:" there are then six
6 paragraphs setting out the various grounds:
7 one, which an appeal may be taken.

8 Now, am I to understand that, Mrs. Posner's
9 brothers are applicants for, Mrs. Posner?

10 MR. WEISS: No, they are presenting her
11 case, for ~~their~~ eligibility for her.

12 HEARING OFFICER: In other words, they
13 have submitted an application for Medical
14 Assistance on her behalf?

15 MR. WEISS: They are now appealing from
16 that denial.

17 HEARING OFFICER: Where do they derive
18 the authority to want Medical Assistance for
19 their sister?

20 MR. WEISS: First, anybody may represent.

21 HEARING OFFICER: With their permission.

22 MR. WEISS: There is no requirements under
23 358.15A, and B, which I believe ~~may be~~ governed
24 by the authorization of the representative, and
25 there is an explicit permission. I am prepared

1
2 to put one or both, either of the, Mark ~~Politz's~~
3 to testify ^{as to} the nature of their communication
4 with their sister, which led them to believe
5 that she wants to remove herself from the
6 hospital, to be near them, to effectuate
7 everything possible, ^{to do} the necessary things
8 to get her Medicaid, that ^{there is} even authorization
9 to so act for her in ^{accord} ^{an} and this place in
10 particular, and that is even more than is
11 required under the rules.

12 HEARING OFFICER: Are you telling me a
13 near relative such as a brother may take a
14 woman away from the responsibility of her
15 husband without his permission?

16 MR. WEISS: There is nothing about taking
17 her away from his responsibility.

18 The only question is, ^{is} she ~~is~~ eligible for
19 Medicaid, Medical Assistance, and the answer is
20 ^{yes, that had} --- nothing to do with the responsibility if in
21 fact she is on Medical Assistance, and there is
22 a question, perhaps the husband should be more
23 responsible, that is then the Welfare's Depart-
24 ^{is} ^{concern} ment, to go and deal with him directly. This is
25 a question of whether she is eligible. The

1
2 answer is she is eligible. The Application was
3 improperly denied, and I am prepared to prove it

4 HEARING OFFICER: Well, I am going to
5 tell you that the Commissioner will, of course,
6 review the record, and it will be his decision,
7 as to whether or not, Walter and Charles
8 Markwoitz, may act here or come in here. It is
9 also his decision as to whether or not they
10 have the right to ask for a Fair Hearing, on her
11 behalf.

12 He will also, of course, go into everything
13 else that is taken here, but his decision, I
14 can't answer. I don't make it, but I would
15 like you to understand what it could possibly
16 be.

17 MR. WEISS: Well, let me point out 350.2.

18 HEARING OFFICER: Just a moment! Is,
19 Mrs. Posner, capable mentally of expressing any
20 desires in this respect?

21 MR. WEISS: At this point, apparently, not.
22 When this process was started, apparently so, ^{it says} ~~that~~
23 you look at Section 350.2, ^{that} the applicant
24 himself, any adult member of his family, any
25 person acting in his behalf, and any other

1 *Can apply*
2 Agency or institution, the application was
3 properly made, ~~and it largely deals with a~~
4 ~~denial~~, *the subject of* and can be ~~told with~~ a Hearing, and
5 ~~if~~ they properly represent her interest.

6 The question ~~is~~ *is* a factual one, is she
7 eligible or not. She is eligible, because she
8 is indigent.

9 HEARING OFFICER: I am not saying that
10 the application cannot be made in her behalf,
11 what I am saying, do you have anything to
12 satisfy me that she has acquiescent in this,
13 or had acquiescence in this; without that, I
14 am sure that there is no stand here.

15 MR. CAULDWELL: On behalf of the Home,
16 I have a copy of a letter, and it was written
17 to the Department of Social Services by the
18 doctor at the Home, as to her condition.

19 I don't have the original.

20 You have a copy, maybe I have it here.

21 All right.

22 MR. WEISS: I present no documents what-
23 soever. I like to state two things; the first
24 is that the rules as far as an application do not
25 require ~~doctoring of~~ acquiescence or official

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2 authorization, ^{to} ~~with~~ the contrary, anybody ^{is} ~~is~~
3 able to apply and largely anybody is able to
4 appeal.

5 Secondly, I am prepared to put ~~to~~ either
6 or both of the Markowitz's on the stand to
7 testify, ~~in which~~ ^{that} their sister communicated
8 to them that she wants them to go ahead and
9 do certain things, which include the application
10 for Medical Assistance to them for the
11 statutory authorization they need.

12 HEARING OFFICER: Can they do it, in the
13 face of a husband who says no?

14 MR. WEISS: There is nothing in the rules
15 that prevents them to do that. The question of
16 eligibility has nothing to do with the ^{decision} ~~operation~~
17 of a husband, nor can you point me anything in
18 the regulations or rules that say to the
19 contrary.

20 HEARING OFFICER: Can you give me any
21 legal authorization for any one to walk into a
22 family, and remove a member of that family who
23 is legally responsible for that person.

24 MR. WEISS: She is being cared for in an
25 institution, where she does not want to be. Nor

Does the rest of her family want her to be and the provision rule 35011 and 350.2 ---

HEARING OFFICER: I am not speaking about an application. I am getting past that. Who has the authorization to determine where this woman will be placed, the brothers or her husband?

MR. WEISS: That is not a question before this tribunal.

HEARING OFFICER: I think it is certainly.

MR. WEISS: Where is it in the Fair Hearing Notice, ^{or} in the Notice the denial, ^T the denial of the eligibility established under 366, it does not speak at all on the consent or participation of an office or desired location. The only question is, in fact, she is eligible. We are prepared to present what she has communicated with the, Markowitz's and too, the facts of the eligibility.

The fact that a husband, you have a copy, a proported copy, by her husband --- has no relevancy. Can you point to me anything in the Statute that makes that relevant?

HEARING OFFICER: If, Mr. Posner, is

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12.

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financially able to support his wife, is he not
3 provided to do so?

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MR. WEISS: There is a separate provision
under the Medical law, Medical Assistance, and ^{when}
there is a legal responsible relative meaning,
Mr. Posner, again, the Medical Department must
proceed and shall proceed against him. We have
those options to do that.

10

11

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HEARING OFFICER: I understand. Can you or
anyone else place a burden upon a person that
does not wish to assume that?

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MR. WEISS: In the fact there is no Statute
that talks about it. It talks about the appli-
cation and liability. We are not concerned with
liabilities. We are concerned with the applica-

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HEARING OFFICER: You are saying that one of
those two Agencies should assume responsibility
for, Mrs. Posner, and turn around and tell Mr.
Mr. Posner we have no care for your wishes. You
are going to pay for it?

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23

MR. WEISS: We have no option to that. The
question is whether or not she is eligible.

24

25

HEARING OFFICER: Doesn't he have anything
to say about this?

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2 MR. WEISS: There is nothing in the law
3 that says he has to. If you have a client ---
4 ^{under} the Statute, ^{it is} the fact that the law finds
5 eligibility without reference to a responsible
6 relative, or possible responsible relative.
7 ^{regardless of how} Unhappiness, ~~becomes the law~~; clearly what
8 ~~emerge~~, there is a rationale and we have a
9 woman who is being kept away from her family,
10 and has been denied Medical treatments in the
11 past, because of her husband.

12 HEARING OFFICER: Are you saying she is
13 not getting proper care?

14 MR. MARKOWITZ: She is getting custodial
15 care. She is being denied the medical attention.
16 If she was in New York City here, her husband
17 is indifferent to this.

18 MR. CAULDWELL: May I say something?

19 HEARING OFFICER: You are here representing
20 the Home?

21 MR. CAULDWELL: I came primarily as an
22 observer, and if there are statements made
23 like that, I want to refute that.

24 MR. WEISS: I want to make a point that
25 ^{for the fact} the rationale ^{is} that ^{no one} cannot block an application

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2 by the eligible persons by the protest of
3 someone ^{possibly} responsible is that people who are
4 eligible need the Assistance, and they should
5 have the care, and ^{after} they should not try to avoid
6 the responsibility by ^{claiming necessity of} authorization. He
7 should pay for her needs, and she should get
8 proper placement and if the Department feels
9 he should be liable, ^{well} but it is his option.

10 HEARING OFFICER: Excuse me, you are
11 making a statement which I think is very strange.
12 He is not here to defend himself.

13 MR. WEISS: You are introducing wrong
14 conclusions into evidence. A copy of that
15 proports to be evidence, and it is irrelevant
16 and should not, because of rationale ^{and statute}

17 HEARING OFFICER: I think the rights of
18 a husband certainly come into place here.
19 You simply cannot do away with that.

20 MR. WEISS: It does ^{not depend} ~~depend~~ on what sort of
21 right he had. He had no right to put her in
22 the Home.

23 HEARING OFFICER: Mr. Weiss, you cannot give
24 a person one right and impose a burden.

25 MR. WEISS: What right are we talking
about?

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2 HEARING OFFICER: We are talking about a
3 duty of supporting.

4 That is your personal opinion.

5 You can make a statement at this point.
6 I am simply arguing the legal points with your
7 attorney, because they are certainly going to
8 be taken into consideration.

9 I wish him to know clearly and whoever
10 is in this room I do not make the decision.

11 It is made by the State Commissioner of
12 the Department of Social Services, in Albany,
13 and he will rule on every aspect of the matter.
14 It will come out over his name, in a written
15 decision.

16 MR. CHARLES MARKOWITZ: That we understand.

17 HEARING OFFICER: I think we have covered
18 the preliminary matters.

19 MR. WEISS: Do you have to take testimony
20 from either or both of these, the Markowitz's?
21 who have communicated with Mrs. Posner, who is
22 authorizing them or are you willing to accept
23 the characterizations I have offered you?

24 HEARING OFFICER: I said if you wish to
25 put it in, I will take it.

MR. WEISS: Do you want to do it now or later?

HEARING OFFICER: I would like to ask Mr. Statmin, what information his Agency has. Mr Statmin is here as a representative of the Bureau of Medical Assistance, the Department of Social Services Bureau of Medical Affairs.

S A U L S T A T M I N, called as a witness on behalf of the Agency, was examined and testified as follows:

EXAMINATION BY

HEARING OFFICER:

Q You may proceed for the Agency, Mr. Statmin.

A Yes Let me first state, the first time my office was notified of this Fair Hearing, was last week, in that we were told that a Fair Hearing was scheduled at this date, at this time.

We have never received written notification of this Fair Hearing; nor have we received either in writing or any other form, the complaint or request for a Fair Hearing by Mrs. Posner, or even in her behalf, in any other way by the State Department of Social Services, Mrs. Posner, or anybody acting on her behalf.

Q Do you have an application?

A No, I received the Bureau of Medical Assistance, that

1
2 is concerned with the eligibility for Medicaid or Medical
3 Assistance for or within the City of New York area.

4 Until September of 1973, my office has not been in-
5 volved directly with eligibility for nursing homes,
6 chronic care facilities or public homes or infirmary care.

7 Our records show that there is no application, or
8 record of an application for Medical Assistance on the
9 behalf of Estelle Posner, at the Bureau of Medical
10 Assistance, at the New York City Department of Social
11 Services.

12 Q In other words, you are saying your records do
13 not disclose any application made to the City of New York,
14 the Department of Social Services, for Medical Assistance,
15 either by or on behalf of Mrs. Posner?

16 A That is right. As far as Medical Assistance, in the
17 community of New York City, or for Medical Assistance as
18 an in-patient in a hospital in New York City.

19 HEARING OFFICER: Mr. Weiss, would you
20 know if an application was made to the City of
21 New York?

22 MR. WEISS: The only application that has
23 been made thus far has been up in Oneida County
24 and was denied there, and this is an appeal
25 from us, but we will have testimony anyway on

1
2 the participation from New York City.

3 MR. STATMIN: Well, I must request some sort
4 of a deferral, in this participation, since you
5 state that no application was made to New York
6 City, made in, Oneida County.

7 So, the only complaint or grievance you
8 have is action taken by the Oneida County?

9 MR. WEISS: Denial of the application, ^{by} who
10 is responsible at what level of authority, it is
11 a State-wide program.

12 MR. STATMIN: It is a State-wide program.
13 The only action taken by any locality or Agency
14 in Oneida County.

15 HEARING OFFICER: They cannot bind any
16 other Agency.

17 MR. WEISS: Exactly, and they apparently did
18 not choose to be here, or have a representative

19 MR. STATMIN: There was mention of a summary
20 that was submitted by Oneida County?

21 MR. WEISS: I never received a copy of it.
22 There may be such a summary.

23 MR. STATMIN: May I ask whether a Hearing
24 had been scheduled in Oneida County?

25 MR. WEISS: Yes, initially, there had been.

1
2 because people who testified were there, and
3 he transferred it down here.

4 MR. STATMIN: Was there any testimony
5 given in Oneida County?

6 MR. WEISS: No, that Hearing was transferred
7 down here; since the last Hearing, the transcript
8 was lost.

9 MR. CAULDWELL: The Department made a
10 ruling up there. It does not say it was based
11 on a Hearing.

12 MR. WEISS: ^{There} ~~It~~ has never been a Hearing
13 ruling, there has been a denial of the appli-
14 cation by the local county and this is what
15 we are appealing from.

16 MR. CAULDWELL: But, there was a decision
17 by the Department.

18 MR. STATMIN: There was a decision by the
19 Department of Social Services, in Oneida
20 County? We agree on that?

21 MR. WEISS: Right.

22 MR. STATMIN: Do you have a copy of that?

23 MR. CAULDWELL: I have one.

24 MR. STATMIN: Mr. Cauldwell has one. Does
25 the State Department have one, Mr. Cimorelli?

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2 HEARING OFFICER: I don't see a copy of
3 a denial.

4 MR. CAULDWELL: It was addressed to Mrs.
5 Posner, at the Home.

6 HEARING OFFICER: I have some original
7 letters and some copies here that I am going to
8 show you in a moment, Mr. Weiss.

9 MR. WEISS: Again, I object to the use,
10 whether it hurts me or not, I object to any
11 use of documents that are not the originals.

12 HEARING OFFICER: You are objecting to
13 anything that is not original?

14 And that file has been lost. I think
15 that it will be sufficient for our purposes
16 at this Hearing, to accept copies of documents.

17 MR. WEISS: That is compounding incompet-
18 ency with the ^{incompet} procedure. Clearly, we do not
19 know what was in that file before, or have
20 any evidence ^{or} what we call the, best evidence
21 rules here, and there are original letters.
22 So, there is something.

23 HEARING OFFICER: I will show you what I
24 have here. I have here a letter from the
25 Oneida County of Department of Social Services

1
2 which is dated August 30th, 1973, addressed
3 to the New York City Department of Social
4 Services at 1450 Western Avenue, Albany,
5 New York. And it is regarding the Fair Hearing
6 and it reads: Fair Hearing, Charles and Walter
7 Markowitz, for Estelle Posner. The letter I
8 will show you. There were documents which
9 came with it. I will also show you them.

10 MR. WEISS: I also like to point out
11 these should have been given to me before
12 this Hearing, and they are ⁱⁿ admissible on those
13 grounds, as the rules require *my saying this first*

14 HEARING OFFICER: If you wish to have a
15 copy of whatever is in this file, I will adjourn
16 the matter and have it rescheduled at which
17 time the documents contained in this file will
18 be copied and submitted to you.

19 MR. WEISS: I believe that is not a
20 proper remedy, because it is too difficult to
21 have an adjournment. We must go ahead, but
22 the Department has failed its obligation to
23 provide me with copies, and therefore, they
24 should be excluded.

25 HEARING OFFICER: Now, I will give you the

1
2 alternative. You can request an adjournment
3 of the Hearing.

4 MR. WEISS: It will work a hardship. It
5 will not be accepted and it is ^{by} appropriate to
6 have documents that were not present
7 before.

8 They
HEARING OFFICER: Were documents that
9 were addressed to my Department, and I think
10 they belong to my Department.

11 MR. WEISS: The rules also require that
12 they be shown to me before.

13 HEARING OFFICER: I will recess and give
14 you time to study.

15 MR. WEISS: I would like to have that, too.
16 I would like to do my own research, and also to
17 be aware of my right to have them in accordance
18 with the Rules prior to this Hearing.

19 HEARING OFFICER: You are entitled to all
20 your rights, which are reserved under the law,
21 and I certainly am not in any way trying to
22 foreclose you. I will recess for 5 minutes,
23 and let you look at what I have here.

24 We will now go off the record for 5 minutes.

25 HEARING OFFICER: On the record.

1
2 Have you had an opportunity to examine
3 the documents which I handed you?

4 MR. WEISS: Yes.

5 HEARING OFFICER: I note and I think
6 you mentioned while off the record, a number
7 of these documents are letters, which you
8 yourself had drafted and in relation to
9 securing a Hearing here; is that correct?

10 MR. WEISS: That is correct.

11 HEARING OFFICER: Are we ready to proceed?

12 MR. WEISS: I also believe, through no
13 fault of yours, there were other letters, and
14 correspondence, and I suppose they are in the
15 other file?

16 HEARING OFFICER: Yes, I was in contact
17 with my office by phone yesterday. My office
18 in Albany, and I have instituted a search for
19 the previous transcript of the Hearing, which
20 was held to see if that was not attached to
21 the file. It is possible that they may have
22 that transcript.

23 MR. WEISS: I don't think you have the
24 transcript. I bought an article seven-eight
25 to get it. They said they couldn't find the
notes.

1
2 HEARING OFFICER: I hope we can find
3 the original file. We will go ahead. We are
4 to the point where you stated that the appli-
5 cation was made to Oneida County, and was
6 denied by the County.

7 MR. WEISS: We have summarized that decision
8 on exactly two grounds: one, is where she
9 resides, and the other is making use of resources

10 Primarily, I'd like to point out first,
11 that the decision in the Hearing summary. are
12 incorrect to numbers. When they said 360.3.

13 I believe they were referring to 360.9.

14 Let me also say as per a legal position
15 the legal position we urged ^{as} on that both
16 grounds are wrong. The first ground ^{as} current
17 residence and this is a state-wide application,
18 and which County ^{to} belongs ultimately is an
19 internal matter. And it is irrelevant to
20 where the application was made.

21 HEARING OFFICER: May I clarify that?

22 If I may? What they are saying is that
23 they did not deny. I believe at this point,
24 that she is ineligible for Medical Assistance,
25 on the ground that you are raising, which is

1
2 "residency by the Agency. That she is not a
3 resident of that County, and that County of
4 her residence is responsible for her care;
5 in the event she is eligible for Medical
6 Assistance.

7 MR. WEISS: But, this is not a ground to
8 deny her application, saying that she is in-
9 eligible. The fact that she applied for one
10 County, to another, is irrelevant to her eli-
11 gibility. The eligibility was denied on
12 insufficient grounds.

13 HEARING OFFICER: Well, she is not a
14 resident in that County, they do not have to
15 grant Assistance to her.

16 MR. WEISS: The application says it is a
17 standard program, for whatever community ends
18 up to reimburse. This is an argument to be
19 made, that she is a resident there subject to
20 a Supreme Court decision, including the Supreme
21 Court decision, ^{Thompson} ~~Goss~~ vs. Shapiro, where a
22 person in the mental ^{institution} ~~house~~, Minnie Harlow^W, a
23 companion case, ~~and she was also in a mental~~
24 ~~house.~~ She was considered a resident during
25 the time she was in the hospital. I represented

1
2 Minnie Harold. I was one of her attorneys.
3 Another reason ^{is that} all sources must be utilized.
4 360.8 is not the appropriate reference, because
5 under the chapter, ^{of} two of the rehabilitation
6 laws, section 249.11 is quite clear that a
7 recipient has a right to choose the provider
8 of Medical Assistance. The fact that they have
9 to ^{have not mean} been one medical facility, they could ^{not} go to
10 another one. What the full resources means is
11 you have to take advantage of what you have,
12 where you are. You do not have to be chained
13 to one place. ^{If not} For 249.11, it would clearly be
14 unconstitutional and it would prejudice the
15 freedom ^{to} of a traveller and infringe upon
16 family privacy.

17 So, 249.11 recognizes the constitution ^{of}
18 ^{compulsion in such} compulsive situations. The fallacy is a misin-
19 terpretation of ^{249 about} ~~3499~~ thus utilized ^{by} the grounds
20 ~~that advised which are~~ properly. The only
21 ground before this tribunal is the appeal ^{from}
22 the denial. ^{ground} Both are clearly wrong under the
23 law, and I believe references to these sections
24 and references to the Court decision make it
25 perfectly clear.

1
2 MR. CAULDWELL: I have a copy of the
3 decision in Oneida County, the ground of the
4 denial of the decision stated on the bottom.

5 There is only one ground.

6 HEARING OFFICER: Mr. Weiss, have you
7 seen a copy?

8 MR. WEISS: No, I have not.

9 HEARING OFFICER: This is dated March
10 14th, 1973, and is addressed to, Estelle Posner.
11 at the Masonic Home, Bleecker Street, Utica
12 New York.

13 MR. WEISS: That was not sent to the
14 representative who made the application.

15 MR. CAULDWELL: Mr. Weiss is not purporting
16 to be appealing from that decision, I assume he
17 has seen a copy of it.

18 MR. WEISS: No, I was told there was a
19 denial. It said client is not eligible, living
20 in Masonic Home. That is precisely what they
21 have elaborated.

22 MR. STATEIN: Mr. Weiss, why was the
23 application made to Oneida County?

24 MR. WEISS: Because, that is where she
25 resides.

1
2 MR. STATMIN: You say she is a resident
3 of Oneida County?

4 MR. WEISS: Yes, and in a number of
5 other cases, you require residency, if you
6 are in a hospital or not.

7 HEARING OFFICER: I will accept a letter
8 a copy of a letter from the Oneida County
9 of Social Services, which is dated March 24th,
10 1973, and addressed to Estelle Posner, at the
11 Masonic Home, Bleecker Street, in Utica, New
12 York. And I will introduce and accept on
13 behalf of the Home, and it was introduced, by
14 Mr. Cauldwell.

15 Off the record.

16 (Discussion held off the record.)

17 HEARING OFFICER: On the record.

18 While we were off the record, there was
19 a discussion between Mr. Statmin and which has
20 to do with the residency, and the division of
21 the State in the Social Services district.

22 Well, let's get on now.

23 Mr. Weiss, where did Mrs. Posner live before
24 she went into the Masonic Home?

25 MR. WEISS: Why don't I put Mr. Walter

1
2 Markwoitz, on and go on from there.

3 HEARING OFFICER: Very well, it is not
4 necessary to swear the witness.

5 W A L T E R M A R K W O I T Z, called as a witness on
6 behalf of the Appellant, was examined and testified
7 as follows:

8 EXAMINATION BY

9 MR. WEISS:

10 Q Mr. Markwoitz, can you tell us where your
11 sister was residing before she went into the Masonic
12 Home?

13 A She lived with her husband at 6700 92nd Street,
14 Flushing in Queens.

15 Q For how long has she lived there?

16 A About eight years.

17 Q Did she go from that home directly to the
18 Masonic Home?

19 A No, about a week before she was brought to my
20 mother's residence to stay.

21 HEARING OFFICER: Where is this?

22 MR. WALTER MARKWOITZ: In the Bronx.

23 Q Who brought her to your mother's residence?

24 A Mr. Posner.

25 Q Why did he bring her there?

2 A He claimed he could not take care of her alone.

3 Q How did she get there from the Masonic, to your
4 mother's home?

5 A They came with their son and daughter and said
6 that my sister was going to be taken care of at the
7 Masonic Home up in Utica, let's go and pack your things,
8 and away she went.

9 Q And roughly, to the best of your knowledge,
10 was she admitted to the Masonic Home?

11 A To the best of my recollection, on August of 1971.

12 Q Has she been there since?

13 A Yes, sir.

14 Q Have you had occasion to visit her?

15 A Very very often.

16 Q Can you tell us roughly how often? Once or
17 twice a month?

18 A I have two brothers, and we rotate each visit. She
19 is seen roughly about every three weeks, by either myself
20 of my brother, Charles. My brother, Max, and my mother,
21 generally goes when we visit my sister. So all in the
22 two years, or twenty-six months, I venture to say we
23 have been there at least sixty times.

24 HEARING OFFICER: Excuse me, please. You
25 or one of your brothers, approximately once a

1
2 week --- what I am saying is that either once
3 a week; I don't mean visits.

4 MR. WALTER MARKOWITZ: Not that, approx-
5 imately, I would say every three weeks.

6 HEARING OFFICER: Every three weeks? One
7 of the members of the family would fly up there
8 or drive up there, or go by bus or train?

9 MR. WALTER MARKOWITZ: Yes.

10 EXAMINATION (CONT):

11 Q During the course of these visits, have you
12 ever had occasion to discuss with your sister how she
13 felt about being in the Masonic Home?

14 A Yes, from the very first visit, she said, what am
15 I doing here. I want to go home. I don't belong here.

16 Q Did she ever discuss with you what you should
17 do in order to help her, so that she could have the wishes
18 fulfilled?

19 A Yes, she asked how she could get out of there, and I
20 told her I am doing the best. I am trying to get legal
21 counsel. I am not an attorney. I don't know how she got
22 up there in the first place. This was when she was
23 coherent enough to understand my conversation with her.

24 Q Can you describe to the best of your knowledge
25 what type of medical facilities Masonic Home has?

1
2 MR. CAULDWELL: I object to that. I don't
3 think he is competent to testify to that.

4 MR. WEISS: I asked him to the best of
5 his knowledge.

6 HEARING OFFICER: You are asking some
7 questions on the, you are getting opinions now.

8 MR. WALTER MARKWITZ: I had a conversation
9 with the doctor up there, if you want to put this
10 in the record.

11 HEARING OFFICER: You may relate what your
12 conversation was with the doctor.

13 MR. WALTER MARKWITZ: May I relate on
14 October of 1971, when she was there about two
15 months, I went up there purposely in the middle
16 of the week, so I could speak to the staff
17 physician, Doctor Johnston. My mother and I
18 were there, and spoke to him and he said, these
19 are the records that purport the state of your
20 sister's condition. He wouldn't show
21 them to me. He held them away at a distance.

22 I asked him if the facility could do anything
23 to help her, or is it designed to help her, and
24 he said no, we provide custodial care. We see
25 that she gets her meals on time, and if she has

1
2 a cold, that would be taken care of; other
3 than that, we do not have any technical faci-
4 lities. He indicated there were no medical
5 equipment to judge the severity of her
6 illnesses. We admitted her solely on the
7 basis which accompanied her when she was
8 admitted.

9 He said she could just as well be at
10 home, as up here, because we could do nothing
11 for her up here.

12 MR. CAULDWELL: I must object to that
13 whole line of testimony. I think it is hearsay.

14 MR. WALTER MARK FOLTZ: This is a conver-
15 sation with Doctor Johnston.

16 HEARING OFFICER: It is hearsay, in some
17 respect. We do accept hearsay. Of course,
18 we must have other facts.

19 MR. CAULDWELL: It is not binding upon
20 Doctor Johnston, because he is not here to
21 answer.

22 HEARING OFFICER: Hearsay is taken, and it
23 is given the weight it deserves; in effect,
24 that is all.

25 EXAMINATION (CONT):

2 Q During the course of these past two years, did
3 you have any knowledge as to how often Mr. Posner has
4 visited Mrs. Posner?

5 A Yes, because we visit so frequently, we have had
6 the opportunity to be acquainted with, Mrs. Evans and
7 Mrs. Buzzy, who are staff nurses. We ask them every
8 time, has Mr. Posner come, visited my sister, Mrs. Posner,
9 and no one has ever seen him up there over the course of
10 the twenty-six months that my brothers have gone up
11 there. No one has ever said they saw him. Once, perhaps
12 once, somebody might have seen him.

13 MR. CAULDWELL: Again, I must object to
14 this line of testimony. He is not competent
15 to say whether he has been there or not.

16 MR. WALTER MARKOWITZ: May I say this?

17 HEARING OFFICER: I will overrule your
18 objection at this point.

19 MR. WALTER MARKOWITZ: Sir, the staff knows
20 us by sight.

21 HEARING OFFICER: We won't have to go into
22 that.

23 EXAMINATION (CONT):

24 Q Could you tell us how far the Masnie Home
25 is from where you and your brothers and mother live?

1
2 A Yes, about 300 miles.

3 Q Do you know if your sister has any property or
4 assets, or savings or money at this moment?

5 A Well, I know she had a considerable amount of assets
6 when she lived with my brother-in-law. What happened,
7 I don't know.

8 Q Do you know if she has any assets now?

9 A As far as I know ---

10 MR. CAULDWELL: I object to that, because
11 I don't think he has the knowledge.

12 HEARING OFFICER: He said to the best of
13 his knowledge he knows. You gave two answers.
14 She has some assets, but you don't know whether
15 she has them now.

16 MR. WALTER MARKWITZ: I am sorry. Right
17 now she has nothing.

18 HEARING OFFICER: How do you know that?

19 MR. WALTER MARKWITZ: She has nothing.
20 She is in a room.

21 MR. STATMIN: Does anybody have the power
22 of attorney to represent Mrs. Posner?

23 HEARING OFFICER: There is somebody. We
24 went over that, there is nothing to be presented
25 to me. I was trying to get some authorization

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for, Mrs. Posner to be represented here, as

3

I stated at that point, the Commissioner will

4

rule on that issue.

5

EXAMINATION (CONT):

6

Q Pursuant to that, under rulings 58.15 B, is

7

your sister capable of signing a written authorization?

8

A (No response)

9

HEARING OFFICER: Just a moment!

10

Wait until I have something here to show

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medically that she is or is not. I cannot take

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her word for it.

13

MR. WEISS: You have a letter saying that

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she is incompetent.

15

HEARING OFFICER: I will take the letter

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if you will accept it, because I will not

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take his statement, because I don't think he

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is medically capable of making that statement.

19

MR. WEISS: You can observe that is not

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a medical judgement, it is a statement of

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observation. You can see if somebody is

22

incapable of writing, if you give them a pencil.

23

HEARING OFFICER: Well, you are speaking of

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their physical ability? Is that what you are

25

getting at?

MR. WEISS: Yes.

HEARING OFFICER: You can testify what you saw your sister do. The question again, please.

EXAMINATION (CONT):

Q Have you observed or tried to discuss with your sister signing her name to any documents?

A Recently, yes.

MR. CAULDWELL: May I ask at what point in time on that?

MR. WALTER MARKWOITZ: On my last visit. It was 4 weeks ago.

MR. CAULDWELL: That was October, September or October?

MR. WALTER MARKWOITZ: It was on a Saturday, I guess.

HEARING OFFICER: Just a moment! You are saying about three to four or five weeks ago? Now, what is it you wish us to know about her physical condition that you saw at that time?

MR. WALTER MARKWOITZ: She is incapable of writing.

HEARING OFFICER: What do you mean by 'incapable of writing'?

MR. WALTER MARKWOITZ: I asked her a

Question, could you sign your name, and the pencil fell out of her hand.

HEARING OFFICER: You are speaking of a physical act, that you saw?

MR. WALTER MARKWOITZ: Yes, sir.

MR. WEISS: I have no more questions.

MR. CAULDWELL: I didn't intend to participate, but I can't let some of these statements go unchallenged.

MR. WEISS: Let the record reflect I offer no objections.

CROSS EXAMINATION

BY MR. CAULDWELL:

Q Mr. Markwoitz, when you go to the Home, do you go to the Supervisor's office and tell them you are there?

A No, at one time we stopped because he is not there on the weekends.

Q You could still go to the Administration Building and report you are visiting your sister.

A We could, but we don't.

Q You don't?

A The building where my sister is, and the Administration Building is half a mile away.

Q In other words, what I am asking you, do you go

1
2 right to the building where she is, so that the officials
3 at the Home don't know you are there?

4 A Well, the registered nurses know she is there.

5 Q A moment ago, Mr. Posner, you said was never
6 there. You don't know that at all?

7 A Mr. Cauldwell, the registered nurses on duty, Mrs.
8 Evans, and Mrs. Buzzy, and several other nurses who know
9 us, we think they have some standing in the facility,
10 and they told us they never saw him.

11 Now, you can ask them.

12 Q You don't know of your own knowledge how many
13 times, Mr. Posner was there?

14 A All I know, Mr. Cauldwell, is what they tell me.
15 May I just continue for one second, sir?

16 Mrs. Evans, who is the floor nurse and has been on
17 the floor with my sister about a year and a half, knows
18 my mother. My mother calls very frequently. My brothers
19 go very frequently. She has told us that, Mr. Posner
20 doesn't exist.

21 Mrs. Buzzy who is now taking her place, a registered
22 said nurse, they were very few visitors.

23 MR. CAULDWELL: I object to that as being
24 not responsive to my question.

25 HEARING OFFICER: I don't see what relevance.

1
2 "this has. We are getting second and third hand
3 opinions, or statements as to whether or not
4 he has been there, or is going there.

5 I see no relevance at this point, as to
6 his being there or not being there.

7 CROSS EXAMINATION (CONT):

8 Q I have one or two more questions I'd like to
9 ask.

10 Do you know how many years Mr. and Mrs. Fosner
11 were married?

12 A Thirty three years.

13 Q They have two children, a son and a daughter?

14 A Yes.

15 Q Do you know their approximate age?

16 A Daughter born 1943, she is 30 years old, and the son
17 was born on 1947, this December will be 28 years old.

18 Q Do they live in the New York City area?

19 A I have no idea.

20 Q Have they been communicated with in reference
21 to this matter?

22 A Very indirectly.

23 Q Any reason why you have not?

24 A We don't know their number. It is unlisted. The one
25 son is in California. We don't know where he is.

1
2 MR. CAULDWELL: I would like to get the
3 record straight. A record of property
4 assigned to Mrs. Posner, this is required when
5 they come into the Home.

6 MR. WEISS: I would like to have that in
7 the record. This will demonstrate she has no
8 assets.

9 MR. CAULDWELL: Whatever assets, it demon-
10 strates she has assigned to the Home.

11 HEARING OFFICER: Off the record.

12 (Discussion held off the record.)

13 HEARING OFFICER: On the record.

14 While we were off the record, there was
15 a discussion relative to a document, which I
16 have before me, and it is an assignment, which
17 bears a signature, Estelle Posner, which is
18 notarized and it is dated July 13th, 1971.

19 Mr. Weiss, is there something you wish to
20 say about this document?

21 MR. WEISS: Yes, I would like to have this
22 introduced into evidence, which indicates she
23 has no assets. This document assigns all
24 assets as of July 31st, 1971, in order to
25 establish her eligibility for Medical Assistance

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as impoverished.

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4

HEARING OFFICER: You wish this as an Exhibit?

5

MR. WEISS: Yes, please.

6

HEARING OFFICER: Any objections to it?

7

8

MR. CAULDWELL: I object to it being an Appellant's Exhibit.

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HEARING OFFICER: I will accept and mark as an Exhibit produced into evidence, by the Masonic Home, and introduced by Mr. Cauldwell, the document is, Masonic Home Exhibit 2, for the Home.

(Above described marked as Exhibit 2 for the Home, in evidence, as of this date.)

MR. STATEIN: I have a question on the document.

MR. CAULDWELL: It is merely a copy, I have the original on file.

MR. STATEIN: What does it reflect as far as ---

MR. CAULDWELL: Well, some statements have been made that she was coerced into the Masonic Home, and she voluntarily assigned her property.

MR. WEISS: I don't know what relevancy this has.

MR. CAULDWELL: I have one more question.

Mr. Walter Markowitz, the last time you were there about four weeks ago, she was incapable of writing?

MR. WALTER MARKOWITZ: Yes, sir.

MR. CAULDWELL: What was her mental condition at that time?

(No response)

HEARING OFFICER: Are you asking him for his opinion?

MR. CAULDWELL: Let me rephrase it. I will withdraw that question. Did she understand what you were saying to her?

(No response)

MR. WEISS: I object to that.

HEARING OFFICER: Again, this is going to call for an opinion or possibly a conclusion on his part, whether she did understand or did not

MR. CAULDWELL: I withdraw that question. I would like to offer into evidence a letter written by Doctor Johnston of the Masonic Home. A copy of this was presented to the Supervisor of the Home, regarding Mrs. Posner, dated August 31st, 1971, in which the doctor states

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2

her mental and physical condition.

3

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MR. WEISS: Could I inquire why we don't have the original of that?

5

6

MR. CAULDWELL: Because it went to the Superintendent of the Home.

7

8

HEARING OFFICER: The letter to Mr. Pollicane was dated September 7th, 1973.

9

Off the record.

10

(Discussion held off the record.)

11

HEARING OFFICER: On the record.

12

13

Mr Weiss, do you have any objections to this letter being introduced into evidence, on behalf of the Masonic Home?

14

15

MR. WEISS: No.

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HEARING OFFICER: I will accept and mark as Exhibit 3, for the Masonic Home, a letter bearing the date August 31st, 1973, and it is a copy of a letter, I should say, and addressed to William Brenizer, the Superintendent at Masonic Home, Utica, New York. It is from a Doctor A. B. Johnston, Medical Director.

23

24

(Above described marked as Exhibit 3, for the Home, in evidence, as of this date.)

25

MR. STATIN: And I pursue a series of

1
2 Questions concerning the reasons why, Mrs.
3 Posner was transferred to Masonic Home, as
4 opposed to seeking care in New York City, or
5 anyother Jurisdiction?

6 HEARING OFFICER: No, I have no way of
7 knowing why or what happened.

8 MR. STATMIN: I am asking Mr. Walter
9 Markwitz, since he was involved with his
10 sister's care.

11 MR. WEISS: Why is that relevant to this
12 Hearing?

13 MR. STATMIN: I am interested why this
14 facility was considered for her care?

15 MR. WEISS: What would that have to do
16 with her eligibility for Medical Assistance?

17 MR. STATMIN: It fixes New York City for
18 the medical eligibility, and her constituency.

19 MR. WEISS: I submit it is irrelevant.

20 HEARING OFFICER: I don't see the relevance
21 at this point. Do you have any other questions
22 of Mr. Walter Markwitz, Mr. Weiss, or Mr. Charles
23 Markwitz?

24 MR. WEISS: No. I would like to examine
25 Mr. Charles Markwitz.

1

2 C H A R L E S M A R K W O I T Z, called as a witness on
3 behalf of the Appellant, was examined and testified
4 as follows:

5 EXAMINATION BY

6 MR. WEISS:

7 Q You heard your brother's testimony, is there
8 you would like to add to it, or anything you would like
9 to say?

10 A No, by and large, my brother has stated the situation
11 as it exists. Her medical condition, the frequency of
12 our visits, her pleasure of seeing us.

13 Unfortunately, she cannot express herself the way
14 she was able to when she was first admitted, but the
15 look on her face ---

16 Q Were you present when, Mr. Posner came by to
17 take Mrs. Posner to the Masonic Home?

18 A Yes, it took place on a Sunday. Mr. Posner came, and
19 took my sister into the bedroom, spoke to her, and it was
20 impossible not to hear her and the conversation and the
21 gist of it.

22 It was ---

23 MR. CAULDWELL: I object to the conversation
24 because between two other persons.

25 MR. WEISS: I think it is very relevant,

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2 what her anticipation was, to want their
3 authorization. She wants them to get her,
4 the reason implied is that she went up there
5 with defeatist expectations. I want him to
6 speak about the expectations he heard at that
7 time.

8 MR. CAULDWELL: Unless, Mr. Charles
9 Markwoitz was actually in their presence and
10 heard this conversation.

11 Where were you, Mr. Charles Markwoitz?

12 MR. CHARLES MARKWOITZ: Three feet away.

13 HEARING OFFICER: Mr. Markwoitz, you heard
14 your sister and her husband discussing her
15 going to the Home?

16 MR. MARKWOITZ: Yes.

17 MR. CAULDWELL: Before we continue, he
18 said a while ago, Mr. Pcsner took his wife into
19 the bedroom. He said he overheard. I don't
20 know how he overheard.

21 MR. MARKWOITZ: I was just from here to
22 here.

23 HEARING OFFICER: In other words, Mr.
24 Markwoitz, your sister and your brother-in-law
25 were eight to ten feet in your sight?

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2

MR. CHARLES MARKWOITZ: Yes.

3

EXAMINATION (CONT):

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Q To the best of your knowledge, what did you overhear between them?

5

6

A My brother-in-law told my sister don't worry, they are going to take good care of you. They are going to help you and make you better.

8

9

Q Anything else?

10

A That was the general tone of the conversation. The next morning they came for her, Monday.

11

12

MR. STATMIN: Who came?

13

MR. CHARLES MARKWOITZ: The daughter and husband, and the son was in California.

14

15

HEARING OFFICER: The daughter and the son came and took her and brought her to Utica?

16

17

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MR. WALTER MARKWOITZ: I have one statement to make. Mr. Cauldwell mentioned something before about insinuating that some ways she was coerced into going up there. She was persuaded at the time, because she wanted to get better, and he told me that she probably would have to be up there more than six or seven months, because of the type of care she would get. They

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1
2 would give her medication. They would give her-

3 MR. CAULDWELL: I object.

4 MR. WEISS: You have a legal objection?
5 State the legal objection.

6 MR. CAULDWELL: I think this witness is
7 incapable of testifying to a subject of this
8 sort.

9 HEARING OFFICER: I don't see the relevanc.

10 MR. WEISS: The relevancy, ^{is} why would she
11 her
12 authorize them to remove from Masonic Home,
13 and apply for Medical Assistance? This is
14 the motivation because of her defeated expect-
15 tations ^{from} the statement by her husband, and
her family, and herself.

16 HEARING OFFICER: Mr. Weiss, we haven't
17 gotten this far yet. Where do your clients
18 wish to take their sister?

19 MR. WALTER MARKS ^{CITZ}: I would like to
20 have my sister in a nursing home in the borough
21 of Queens. So, we could visit her. She could
22 see us and we could see her, and as I stated
23 before, she is 300 miles. My mother is 85
24 years old. My sister expressed the very first
25 week that she did not want to be up there. She

1
2 "is unhappy. I can see it in her eyes.

3 MR. CAULDWELL: I object.

4 W A L T E R M A R K W I T Z, re-called as a witness
5 on behalf of the Appellant, was further examined
6 and testified as follows:

7 EXAMINATION BY

8 HEARING OFFICER:

9 Q Mr. Markwoitz, when you say, each time that
10 you have seen your sister, could you tell me her physical
11 condition? Was she in your opinion in clean clothing?

12 A Yes.

13 Q In your opinion, did she look as if her
14 physical needs were being met?

15 I say physical, such as change of clothing, food,
16 rest and material things?

17 A Yes.

18 Q Now, if your sister is moved to a home in New
19 York City, is it in the belief that there is medical
20 assistance available in New York City, which she is not
21 receiving where she is now; that will possibly help her
22 own condition, mentally?

23 A It is my belief, yes, sir.

24 MR. STATIN: When you say mental assistance,
25 you mean medical care?

HEARING OFFICER: I mean medical care.

EXAMINATION (CONT):

Q Do you believe there is more care available here which is not available where she is?

A Yes.

Q What type of care, please?

A Neurological care.

Q You believe it is not available where she is?

A I know it is not available.

MR. CAULDWELL: I object to that.

Q How do you know it is not available, have you inquired?

A Yes, sir. We have inquired, and I have measured the type of care that is available.

Q Are you going to place your sister in a medical institution or a nursing home?

A If we were successful, we would place her in a hospital, and determine the extent of her illness, and if anything can be done for her. Doctor Johnston told me and my brother that the Home where she is now cannot do anything. As a matter of fact, they don't know or have the equipment.

MR. CAULDWELL: I object to the statement.

Q Are you saying that the nursing home in New York

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2 Mr. Posner said no, he refused to release
3 her to see if their equipment was up to date.
4 I think it's related to where she would be
5 better taken care of.

6 With all due respect to Utica, as opposed
7 to New York City, which has probably one hundred
8 percent better facilities.

9 HEARING OFFICER: Is this your opinion?

10 You have nothing to verify this?

11 (No response)

12 EXAMINATION BY

13 MR. WEISS:

14 (Of Mr. Markowitz, Charles)

15 Q Have you made an investigation as to where the
16 leading neuro-surgeons are in the United States?

17 A Yes.

18 Q Where have you located them?

19 A In New York City.

20 Q Any where else?

21 A Nowhere else.

22 HEARING OFFICER: Mr. Weiss, have they
23 made any investigation as to the neuro-surgeons
24 in Utica?

25 MR. WEISS: He testified. He inquired, and

1
2 that was where the best neuro-surgeons were,
3 and they are here in New York.

4 HEARING OFFICER: You also wish to have
5 your sister down here for availability?

6 MR. CHARLES MARKWOITZ: On a compassionate
7 basis. It's not that I want her down here. She
8 asked to come here.

9 MR. CAULDWELL: You didn't state that she
10 said that.

11 MR. CHARLES MARKWOITZ: About two years
12 ago, she could not ask me now.

13 When we talk to her now, her eyes flutter
14 and we see a little sparkle.

15 MR. CAULDWELL: That is purely speculative

16 MR. MARKWOITZ: She has her facilities.
17 She devours this.

18 MR. CAULDWELL: I object to this as being
19 irrelevant.

20 MR. WEISS: I have no more questions of
21 Mr. Walter Markowitz. Do you have anything
22 you'd like to add, Mr. Charles Markowitz?

23 MR. CHARLES MARKWOITZ: We mentioned the
24 fact that she would have access to better
25 medical care. And with all due respect she has

1
2 been very happy to see us on our visits, and
3 it is a pleasure that she derives from our
4 frequent visits, which are extremely expensive,
5 emotionally and physically.

6 I can verify that by the phone calls.

7 HEARING OFFICER: In other words, part of
8 your desire to have your sister down here, is
9 because it is a burden on you to go to see her?

10 MR. CHARLES MARKWOITZ: It is a burden
11 ^{on} for her not seeing us.

12 HEARING OFFICER: You are not answering
13 my question.

14 MR. CHARLES MARKWOITZ: It deprived her
15 of our visits. If it wasn't a burden, she would
16 see us every day of the week.

17 HEARING OFFICER: It is a burden on you
18 to have your sister up there?

19 MR. CHARLES MARKWOITZ: Yes, very definitely.
20 sir.

21 HEARING OFFICER: You and your brother
22 believe as you have said before, there are
23 medical facilities here that can be used?

24 MR. CHARLES MARKWOITZ: Hopefully.

25 MR. WEISS: I have no more questions.

1
2 MR. CAULDWELL: I would like to make a
3 statement for the record.

4 This patient came to the Masonic Home,
5 Mrs. Posner, was previously in the Flushing
6 Hospital in the City in 1970 for a period of
7 approximately a few days, but she was under-
8 going ---

9 MR. WEISS: Are you testifying as a
10 witness?

11 MR. CAULDWELL: I am making a statement.

12 MR. WEISS: I object to this whole line.

13 MR. CAULDWELL: I have to lay a foundation.

14 HEARING OFFICER: Mr. Weiss, I am going to
15 overrule you.

16 MR. CAULDWELL: I have here before me a
17 photocopy of a hospital record, from Flushing
18 Hospital Medical Center, which shows a, Mrs.
19 Posner was in there for tests, and examinations
20 and X-rays, and I'd like to mark this for
21 identification. Also, I would like to state
22 and I don't think that Mr. Weiss will dispute
23 or anybody else there was an inquiry made of
24 sending X-rays, and records to a Doctor in
25 California, a Doctor Chater, and the Masonic

1
2 -Home agreed to this, and it should be done.

3 Mr. Posner also agreed. We have found
4 that the X-rays at the Masonic Home were not
5 available of her head. In fact, I don't think
6 there were any X-rays available. We sent to
7 this Doctor, and Mr. Posner, also agreed that
8 the records from Flushing Hospital, where I
9 think, he is employed by the way, could be
10 released to be sent to this doctor, and that
11 was the end of the matter.

12 I understand Friday something was told to
13 me today, Mr. Walter Markowitz, you have been
14 in consultation with them, but this California
15 proposition did not go through, but Doctor
16 Slamo, took the part of Doctor Chatur.

17 R O B E R T C A U L D W E L L, called as a witness on
18 behalf of the Appellant, was examined and testified
19 as follows:

20 EXAMINATION BY

21 HEARING OFFICER:

22 Q I am going to ask you some questions, Mr.
23 Cauldwell. To you to your knowledge know if Mr. Posner
24 is contributing any money towards the care of Mrs. Posner?
25 A Yes, he is contributing up to since 1971, the sum of

1

2 \$2,500.00.-

3

MR. WEISS: Could you compile payments or
contributions?

4

5

MR. CAULDWELL: For the benefit of the
Home in general?

6

7

MR. WEISS: Clarify that, please?

8

MR. CAULDWELL: Contributions for the Home c
for the benefit.

9

10

MR. WEISS: I object. To what purpose is
it being used. It appears ^{not} to be a contribution
for the care of his wife. Is it the type of
contribution I could make to Albert Einstein
Hospital?

11

12

13

14

15

MR. CAULDWELL: For the general use of
the Home, it is for her benefit as well as
everybody else's.

16

17

18 EXAMINATION (CONT):

19

Q Does the Home bill at all?

20

A There are no bills. They are ^{accepted} ~~expected~~ in indigent
status, and I find when I look over a copy of the record,
that she made, the application when she went into the
Home, she was the wife of a Mason, and no assets stated,
and she listed the fact that she had a son and daughter.

21

22

23

24

25

Q Mr. Cauldwell, is that Home licensed by the

1

2 State of New York?

3 A Definitely.

4 Q What type of license do you have?

5 A As far as the hospital is concerned, it used to
6 be a home and a hospital. So far as the hospital is
7 concerned, it is not licensed as a hospital as such,
8 as for performing operations, usually the care that goes
9 with a hospital, but it is licensed as a senior citizen
10 health facility.

11 It has an infirmary, and every service rendered
12 except for operations.

13 MR. WEISS: Who gave you the license?

14 MR. CAULDWELL: The State of New York.

15 MR. WEISS: What Department?

16 MR. CAULDWELL: I think the Department of
17 Health.

18 MR. WEISS: You don't know.

19 MR. CAULDWELL: This is my best recol-
20 lection. The Department of Health.

21 MR. WEISS: In other words, you have what
22 is called a hospital, part of the home?

23 MR. CAULDWELL: To the extent of treating
24 ~~an~~ ^{various} necessities and things of that sort, if
25 anything serious occurs, if an operation occurs

1

2

they send them to Utica.

3

EXAMINATION (CONT):

4

Q Is it a home entirely for senior citizens?

5

A No, there is a section that is.

6

Q What part of the facility is, Mrs. Posner in?

7

A In the infirmary or health facility.

8

Q As a licensed facility, your Home undergoes

9

periodic examination by the State of New York?

10

A Yes, sir. It is.

11

Q Your license is in order?

12

A Yes.

13

HEARING OFFICER: Now, to summarize

14

somewhat, Mr. Weiss, it is your contention

15

that Mrs. Posner may apply to the Oneida

16

County Department of Social Services for

17

Medical Assistance, in that that Agency is

18

required if she meets all eligible requirements

19

to issue such authorization that she may choose

20

what facility she wishes. Where she wishes to

21

stay; in that event she is unable to do this,

22

or even if she had the facility to do such a

23

thing, her brothers ^{apply} ~~may~~ on her behalf, and

24

would make such an application in spite of any

25

and all ^{opposition} ~~objections~~ by her husband; is that correct?

1
2 MR. WEISS: That is ^{part of the} factual ^{con} text. ^{61.} Her

3 past and her relationship with the family,
4 that is more or less correct.

5 HEARING OFFICER: That there was such
6 an application made to Oneida County, and it
7 was denied, by that County. No application
8 has been made to New York City?

9 MR. WEISS: Not as of this moment. It is
10 my opinion that where you ^{as irrelevant} apply, this is a
11 State-wide eligibility as far as the ^{counties} courts
12 are, this is an internal matter, and the ^{Constitution and} law
13 is clear on that.

14 HEARING OFFICER: Mr. Statmin, is there
15 anything further you wish to present on
16 behalf of the New York City Department of
17 Social Services?

18 MR. STATMIN: No, we have nothing further.

19 HEARING OFFICER: Is there anything further
20 to be presented into evidence?

21 MR. WEISS: I believe none.

22 MR. CAULDWELL: No, unless you want to know
23 what the procedure is for getting into the Home.

24 HEARING OFFICER: I will take that.

25 MR. CAULDWELL: The statement was made

here a while ago by, Mr. Charles Markwöltz, as

to the conversation in their Home, and next day

they took her away.

The procedure is a little more detailed

and takes a little more time than that.

An application is filed at the request of the

applicant's lodge, if it happens to be a

member of the lodge itself; it was on behalf

of the Master Mason's wife, the assignment of

property assigned and the guests are also to

sign a statement of rules and regulations which

are read to them.

So, they know this takes a bit of time.

There is an investigation made by the

members of the lodge, and the lodge agrees to

be responsible if the applicant leaves the Home,

and to take the applicant back at their expense:

when all of this is ready, and there is room

available at the Home, the lodge is notified

and arrangements are made to take the applicant

up to the Home, from that time, the Home, the

applicant is under the care and jurisdiction of

the Home.

For instance, lodging, clothing, without any

1
2 charge. So that, while it may appear that
3 the conversation occurred on one day, there
4 was a period of time for an investigation.

5 MR. CHARLES MARKOWITZ: We know that.
6 There is also a question of the signature
7 involved here. There is a question in my
8 mind as to whether she was capable of signing
9 her signature legibly enough.

10 HEARING OFFICER: Mr. Cauldwell, before a
11 person is admitted to the Home, are they given
12 a medical examination to determine their
13 physical capabilities?

14 MR. CAULDWELL: Yes, and an examination
15 by the doctor as they arrive.

16 HEARING OFFICER: As to possible ailments?

17 MR. CAULDWELL: Yes, there is an appli-
18 cation by the local doctor.

19 HEARING OFFICER: Is there a psychiatrist
20 there?

21 MR. CAULDWELL: No, because we don't accept
22 psychiatric patients. If they require that
23 later on, they are sent to the proper place of
24 care. We do not apply psychiatric care.

25 HEARING OFFICER: I have before me, Doctor

1
2 Johnston's letter and he speaks of her physical
3 condition.

4 MR. CAULDWELL: He speaks of her mental
5 condition.

6 HEARING OFFICER: He states she has shown
7 progressive deterioration, mentally and physically.

8 MR. CAULDWELL: You are probably wondering
9 why she has not been taken then to some place
10 else?

11 Well, the Home does most of the pertinent
12 arrangements. Most of the people are suffering
13 from severe senility, they cannot remember the
14 date of the week, or where their rooms are.

15 They let the people stay and they are
16 harmless to anybody. If they have a serious
17 case, if a person requires a straight jacket,
18 they necessarily must be taken to a place that
19 is equipped to take care of them.

20 HEARING OFFICER: So, your Home is presently
21 able to care for and meet the needs of Mrs.
22 Posner?

23 MR. CAULDWELL: Yes, indeed, she is
24 served her food into her room, and she is
25 fed when necessary. I believe she is incompetent.

1
2 and she is being looked after in that respect.

3 MRS. BETTY MARKOWITZ: In the meantime
4 she lost twenty pounds.

5 MR. WEISS: Are you aware of any neuro-
6 surgical facilities at the Home?

7 MR. CAULDWELL: As far as I know, there is
8 no neuro-surgical facility at the Home.

9 EXAMINATION (CONT);

10 Q Do you know anybody in the Home that has to
11 treat her; do they have any records of that having
12 been done?

13 MR. CAULDWELL: No.

14 MR. STATIN: If a person requires
15 neurosurgery, or neuro-surgical examination,
16 wouldn't that patient be transferred to another
17 facility?

18 MR. CAULDWELL: Yes, a person requiring
19 an appendectomy ---

20 MR. STATIN: Let's say a prolonged care
21 of neurological condition, would such a person
22 be transferred to another facility?

23 MR. CAULDWELL: Except in the doctor's
24 opinion, in this case there is not very much
25 that can be done for her.

1
2 MR. WEISS: Who would pay for the
3 treatment of the facility?

4 MR. CAULDWELL: Well, if a person is
5 transferred to another hospital for care, it
6 would be the responsibility of the Masonic
7 Home.

8 MR. WEISS: How often has this happened?

9 MR. CAULDWELL: I don't know. About long
10 care. I don't know about operations.

11 MR. WEISS: What about neuro-surgical
12 operations?

13 MR. CAULDWELL: This is out of my field.

14 MR. WEISS: You have no idea that this has
15 ever happened in the past?

16 MR. CAULDWELL: No, I do not.

17 HEARING OFFICER: Is there anything further,
18 gentlemen?

19 MR. WEISS: I believe no.

20 MR. STATMIN: No.

21 HEARING OFFICER: There being no further
22 testimony, the Hearing is closed.
23
24
25

November 1, 1973.

I N D E X

WITNESSES

AGENCYEXAM.

Saul Statmin

16

APPELLANTDIRECT EXAM CROSS

Walter Markowitz

29

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38

Charles Markowitz

46, 53

Robert Cauldwell

57

EXHIBITS

APPELLANTPAGE

2 Assignment of Assets

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3 Letter dated 8/31/73

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss

COUNTY OF NEW YORK)

I, MARIE HICKEY, a Shorthand Reporter and
Notary Public within and for the State of New York,
do hereby certify:

That the Fair Hearing in the matter of the
Appellant, ESTELLE POSNER, which was duly reported
by me, as hereinbefore set forth, is a true record
of the testimony given by such witness.

I further certify that I am not related to
any of the parties to this action by blood or
marriage, and that I am in no way interested in
the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set
hand this 12 day of March, 1974.

MARIE HICKEY
MARIE HICKEY, Reporter.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BETTY MARKOWITZ, WALTER MARKOWITZ, & :
CHARLES MARKOWITZ, on behalf of :
themselves and their sister, :
ESTELLE POSNER, :
:

Plaintiffs-Appellants, :

-against- :
ABE LAVINE, individually and as :
Commissioner of the New York State :
Department of Social Services, :

Defendant-Appellee. :
:
:
:
:
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:
:
-----X

AFFIDAVIT OF SERVICE BY MAIL

Index No. 74-1766

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

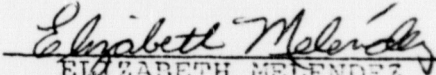
ELIZABETH MELENDEZ, being duly sworn, deposes and says:

Deponent is not a party to the above action, is over 18
years of age and resides at 3 Haven Plaza, New York, New York.

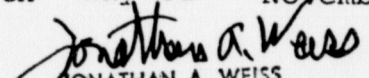
That on the 8th day of November , 1974, deponent
served the within JOINT APPENDIX SUPPLEMENT CONTAINING
CORRECTED FAIR HEARING TRANSCRIPT

upon BURTON HERMAN, Esq., Assistant Attorney General of the
State of New York, 2 World Trade Center,
New York, New York 10047

the address designated by said attorney for that purpose by
depositing a true copy of same in a postpaid properly addressed
wrapper, in an official depository under the exclusive care and
custody of the United States post office department within the
State of New York.


ELIZABETH MELENDEZ

Sworn to before me this
8th day of November 1974.


JONATHAN A. WEISS
Notary Public, State of New York
No. 31-4207275
Qualified in New York County
Commission Expires March 30, 1975